No. 16151

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MICHELE MARCHESE and JESSE DEL BONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S OPENING BRIEF.

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APPELLEES' OPENING BRIEF.

Statement of Jurisdiction.

On April 16, 1958, the Grand Jury for the Southern District of California returned the instant indictment against appellants [Clk. T. 1-2].[1] Not guilty pleas to the indictment were entered on April 21, 1958, and the case was set for trial on May 6, 1958 [Clk. T. 15].

On May 6, 1958, jury trial began in the United States District Court for the Southern District of California, Central Division, and was concluded on May 14, 1958 by verdicts of guilty on all counts against appellant Marchese and by verdicts of guilty on Counts 1, 8, 9, and 10 against appellant Del Bono, and by verdicts of not guilty on Counts 2, 3, 4, 5, 6, and 7 [Clk. T. 35, 36].

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[1]Clk. T. refers to the Clerk's Transcript of Record.

On June 16, 1958, both appellants were sentenced to be committed to the custody of the Attorney General for a period of ten years on each of the counts upon which they had been convicted, the sentences to run concurrently [Clk. T. 47-48].

Timely notices of appeal were filed by each of the appellants [Clk. T. 51, 53].[2]

Statement of the Case.

One Donald Sussman, a narcotic user and seller [R. T. 96, 419-422][3] had been selling heroin on consignment for appellant Michele Marchese for four and one-half years prior to the instant trial [R. T. 417, 473-474, 489-490]. On January 29, 1958, he was arrested by federal officers on charges of selling narcotics [R. T. 434]. After conversing with the officers, he was released on his own recognizance [R. T. 18-95], in order that he might contact his principal, Marchese.

The next day, January 30, 1958, the officers placed a radio transmitter[4] on Sussman's persons and he then went to and entered apartment No. 5, 11032 Moorpark, North Hollywood, California [R. T. 19-20, 126-127, 224, 246, 365]. Outside the apartment, the officers observed a white Chrysler Imperial automobile, license number MLH

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[2]Although we have not been informed of a consolidation of the appeals, we presume that the Court has no objection to our filing a consolidated brief, since such was done by the appellants.

[3]R. T. refers to the Reporter's Transcript of Proceedings.

[4]Throughout the trial and even here on appeal, appellants have attempted to capitalize on certain terminology used by Sussman in describing the radio. At R. T. 425, Sussman described the radio as having "recorded" the conversation. However, the evidence rather clearly demonstrated that no "recording" was obtained, but only that the agents listened upon the set, took notes in longhand and shorthand, and later transcribed them [R. T. 69, 496, 529-530, 532].

304 [R. T. 33, 128, 246-247], the use of which had been given to appellant Marchese by his father, the registered owner of the vehicle [R. T. 122-125]. Inside the apartment, Sussman conversed with appellant Marchese, saying that he had a customer who wanted a $1,000 worth of narcotics, and Marchese agreed to have the appropriate amount of narcotics put in the usual place at a service station at Third and Normandy Streets in Los Angeles [R. T. 31-32, 366-368, 371, 499, 506-508].

Officers then searched the rest room of the Mobile Service Station at that location, and did so after each user thereof left [R. T. 129, 232-234].

Appellant Del Bono was seen to enter the restroom at 1:40 P.M. on January 30, 1958. A search of the premises after he left revealed Exhibit 3A [R. T. 537], a package of heroin, concealed under the wash basin [R. T. 135, 235, 120-121].

Appellant Del Bono later was observed driving to the C & M garage, in which appellant Marchese's father has a one-half interest [R. T. 122].

At 6:40 P.M., Sussman phoned Marchese and was told by Marchese to bring the money to the Moorpark apartment the next day [R. T. 41-42, 374-375].

The next day, January 31, 1958, Sussman was given $1,000 by the officers, had the radio again placed on his person, and proceeded to and entered the Moorpark apartment outside of which the appellant's Imperial again was parked [R. T. 43-45, 138, 381-383, 508-511]. There Sussman gave Marchese the $1,000, $110 of which Marchese returned to him (*ibid.*).

On February 7, 1958, Sussman again had a radio concealed on his person, and met Marchese at the apartment

[R. T. 48-50, 138-139, 335, 383-387, 511-513]. They conversed relative to another $1,000 purchase and a possible $15,000 purchase. Marchese stated the narcotics for the former purchase would be dropped at a service station at Los Feliz and Brand Avenues in Los Angeles (*ibid.*). Thereafter, the officers proceeded to the Standard service station at that corner and searched the rest room [R. T. 163-164, 195-196, 237, 251]. No narcotics were discovered until after appellant Del Bono had been seen to enter and then leave the restrooms; a search then disclosed a concealed package of heroin, Exhibit 4A [*ibid;* R. T. 38]. Sussman returned to the apartment that evening and gave Marchese the $1,000 officers had furnished, and Marchese returned $20 to him [R. T. 53, 253-254, 389]. They also discussed the possibility of a $11,500 purchase by the "customers" of Sussman (*ibid.*).

On March 12, 1958, at approximately 1:30 P.M., Sussman went to the Moorpark apartment again [R. T. 57, 254]. At 4:15 P.M. on the same day, a man who had come from the International Airport entered Del Bono's house carrying a bag [R. T. 338, 350], and was observed by Narcotic Agent Daley, who had been told that a shipment of narcotics was to come in from New York [R. T. 344]. At about 8:08 P.M., Del Bono entered the Moorpark apartment where appellant Marchese's Imperial was located [R. T. 339, 353-354]. At about 9:00 P.M., Sussman entered the apartment [R. T. 58, 254].

The next day, March 13, 1958, at approximately 9:00 A.M., Sussman entered the Moorpark apartment, conversed with Marchese relative to the sale of $11,500 of heroin [R. T. 59, 390]. Sussman and Marchese met later, at approximately 12:00 P.M., at the corner of Vineland and Ventura Boulevards, where Marchese told him the

narcotics later would be found in the trunk of a 1941 Dodge at that corner [R. T. 69, 140, 143, 200, 255, 318-319, 355-356, 393]. Marchese then made a phone call at 12:00 or 12:05 (*ibid.*). At 12:15 P.M., Del Bono left his house carrying a brown paper bag which he placed in the trunk of a 1941 Dodge, which he drove to Vineland and Ventura, where he parked the vehicle and entered a 1957 Buick which Marchese was driving [R. T. 61, 77, 168-171, 177-179, 256, 307]. Sussman obtained Exhibit 5A, a package containing two pounds, 246 grains of heroin, from the trunk of the Dodge [R. T. 61, 78, 121, 396, 538]. Del Bono was arrested near the Moorpark apartment while waiting for a cab, and Marchese was arrested in the apartment [R. T. 201-202, 322].

We disagree with the statement in Appellant's Brief at page 17, wherein it is alleged that the evidence of Del Bono's visit to the gasoline station on January 30, 1958 was admitted against Del Bono alone. At R. T. 539-540, this piece of evidence was admitted against both defendants.

I.

Radio Transmission of Messages Is Not in Violation of 47 U. S. Code Sec. 605.

Appellants complain that a radio transmitter, placed upon the person of Donald Sussman, relayed conversations between Sussman and Marchese to officers, who heard and testified concerning the conversations. This is argued to be in violation of 47 United States Code 605.

Since the case of *On Lee v. United States,* 343 U. S. 747, 753-754 (1952), it has been the law that such use of radio transmitters is proper and not in violation of any statute or of the Constitution. In that case an informant

similarly had been "wired for sound," the officer overheard the conversations between the informant and the defendant and related them to the jury. In holding his testimony was properly admitted, the Supreme Court reasoned:

> "Petitioner urges that if his claim of unlawful search and seizure cannot be sustained on authority, we reconsider the question of Fourth Amendment rights in the field of overheard or intercepted conversations. This apparently is upon the theory that since there was a radio set involved, he could succeed if he could persuade the Court to overturn the leading case holding wiretapping to be outside the ban of the Fourth Amendment, *Olmstead v. United States,* 277 U. S. 438, and the cases which have followed it. We need not consider this, however, for success in this attempt, which failed in *Goldman v. United States,* 316 U. S. 129, would be of no aid to petitioner unless he can show that his situation should be treated as wiretapping. The presence of a radio set is not sufficient to suggest more than the most attenuated analogy to wiretapping. Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver, to be sure, but with the same effect on his privacy as if agent Lee had been eavesdropping outside an open window. The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions. It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance

of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment here.

"Nor do the facts show a violation of §605 of the Federal Communications Act. Petitioner had no wires and no wireless. There was no interference with any communications facility which he possessed or was entitled to use. He was not sent messages to anybody or using a system of communications within the Act. *Goldstein v. United States,* 316 U. S. 114."

In subsequent cases, Courts of Appeal have followed the *On Lee* decision and have admitted evidence acquired through the use of concealed radio transmitters. *United States v. Sansone,* 231 F. 2d 887 (C. A. 2, 1956); *Lott v. United States,* 230 F. 2d 915 (C. A. 5, 1956).

At pages 20 and 21 of their brief, appellants also apparently complain of the reception into evidence of the officer's testimony relating to telephone conversations between Marchese and Sussman which were overheard by the officers. The use of such evidence has been held by the Supreme Court as not being in violation of law. In *Rathbun v. United States,* 355 U. S. 107, 110-111 (1957), evidence obtained by listening upon an extension phone was held proper, and in passing upon the question, it was stated:

"The conduct of the party would differ in no way if instead of repeating the message he held out his handset so that another could hear out of it. We see no distinction between that sort of action and permitting an outsider to use an extension telephone for the same purpose."

Accord: *United States v. Bookie,* 229 F. 2d 130 (C. A. 7, 1956).

As to the cases cited by appellants, it is hard to see the applicability in any respect of *Reichert v. Commissioner of Internal Revenue,* 214 F. 2d 19. Moreover, *United States v. Hill,* 149 Fed. Supp. 83, was overruled by the Supreme Court in the above-cited *Rathbun* case. In the main, the rest of the cases deal with intercepted phone wires, and thus the facts therein are inapposite to those in the instant case. Therefore, appellants' cited cases lend them no support, and the *Rathbun* and *On Lee* Supreme Court and other cases specifically dealing with identical facts should control the issue.

II.

The Evidence Is Sufficient to Support the Verdicts.

Appellants also question the sufficiency of the evidence. Since the evidence must be construed in the light most favorable to the appellee at this stage of the prosecution, we trust that the evidence outlined in our Statement of the Facts is more than ample to sustain each count upon which judgment was entered, and that we need not laboriously repeat or amplify that statement of the evidence. It is also here pertinent to point out that the appellants each were given concurrent sentences of ten years upon each of the counts upon which they were found guilty. Thus if the conviction upon any one of the counts is valid, the judgment must be affirmed.

Winger v. United States, 233 F. 2d 440 (C. A. 9, 1956) and cases cited.

Appellants make various attacks upon the evidence as it pertained to the counts of the indictments. For the lack of a better approach to the problem, appellee will attempt to answer the problem by the piece-meal method of responding to each attack.

At pages 23-24 of their brief, appellants attack the conspiracy count, Count One, charging:

> "There is absolutely no evidence to support the charge of conspiracy or agreement between Michele Marchese and Jesse Del Bono to sell and facilitate the sale of narcotics."

True, there is no *direct* evidence of a conspiracy. However, on three occasions, Marchese tells Sussman that for a designated sum of money, a designated amount of narcotics will be delivered at a designated place. The designated amount of narcotics was so delivered by the co-defendant Del Bono. It takes little guesswork to come to the conclusion that there was an agreement between the two with respect to the sale and delivery of this merchandise. All doubt would seem to be removed when it is considered that Marchese picked up Del Bono in the automobile of the former immediately after the latter had made delivery of over two *pounds* of heroin.

At page 24 of their brief, appellants charge:

> "There is no evidence whatsoever that Marchese actually received the $1,000.00."

The evidence as to Marchese's receipt of the $1,000 for the first transaction is direct and unequivocal. Sussman testified he handed it to Marchese on January 31, 1958 [R. T. 383]. In addition, two agents testified they overheard, via the radio set, Marchese counting this money [R. T. 44-45, 509].

At former page 25 of their brief, appellants claim:

> "One person does not make a conspiracy. Since Del Bono was acquitted of Count One, it follows that Count One of the indictment charged conspiracy between Marchese and Del Bono must necessarily be reversed."

The simple truth of the matter is that Del Bono was convicted of Count One, the conspiracy count [Clk. T. 35; R. T. 754], and we are informed by counsel for appellants that a correction of this will or has been made.

At pages 25-26 of their brief, appellants state:

> "Each of the verdicts as to Counts 2, 3, 4, 5, and 6 by the jury found Del Bono not guilty. Since, however, the alleged delivery on which the government relies and proof of the receipt of narcotic drugs by Sussman requires necessarily proof that Marchese transported the drugs to a place where Sussman claimed to have agreed to have it picked up, the findings of the jury as to each of those counts necessarily finds that Marchese did not have the drugs which Sussman claims to have placed in the various spots where Sussman was supposed to pick them up."

This *non sequitur* scarcely needs refuting. Suffice it to say that we need not have proved that *Marchese* transported the drugs to the designated place, but only that someone did. That someone did do so is clear from the testimony of the agents and officers who found the narcotics.

In this connection, we would like to make clear, though appellants have not, that Marchese was convicted of having been an accessory before the fact to the commission of the offenses named in Counts Four and Seven, and that Del Bono was acquitted of those charges, having been named as the principal therein. This finding of the jury is not inconsistent, and Marchese's conviction upon these counts must stand, so long as there is evidence that *someone* committed the substantive acts of receiving, concealing

or facilitating the concealment or transportation of the heroin charged in those counts.

Meredith v. United States, 238 F. 2d 535 (C. A. 4, 1956);

Colosacco v. United States, 196 F. 2d 165 (C. A. 10, 1952);

Von Patzol v. United States, 163 F. 2d 216 (C. A. 10, 1947);

Rooney v. United States, 203 Fed. 928 (C. A. 9, 1913).

That *someone* transported and concealed the instant heroin in the service stations is clear enough. Thus, Marchese was properly convicted upon such counts as the evidence clearly shows his causing such transportation and concealment to have occured. In any event, the sentences imposed upon these counts was concurrent with the other eight from which Marchese appeals.

At page 27 of their brief, appellants say that Del Bono never was observed to be going to No. 5, 11032 Moorpark, North Hollywood, California. The officers testified Del Bono was observed to have gone into said apartment on the night of March 12, 1958, the night before the two pound delivery was made, and that Marchese's Imperial was there and that Sussman later arrived [R. T. 58, 254, 339, 353-354].

In like vein, it is argued:

> "Del Bono . . . was not observed to participate in any way in any narcotic transaction . . ." (Br. p. 27.)

> "There is no evidence that Jessee Del Bono transported the narcotics in question. . . ." (*Ibid.*)

> "There is no evidence that either defendant ever received, incurred or had in his possession at any time, or themselves transported the narcotics in question. The case must rest therefore on pure speculation and conjecture." (*Id.*)

Appellee sees no point in replying to such arguments and does not, as they either have been made in ignorance of or without regard to the evidence.

The major point of appellants is that the case is founded upon the testimony of the informant Sussman and that, as such, he is unreliable. This argument was made to the jury and rejected by it, thus foreclosing the issue. As stated by the Supreme Court in *Glasser v. United States,* 315 U. S. 60 and by this Court in *Blassingame v. United States,* 254 F. 2d 309 (C. A. 9, 1958),

> "It is not for us to weigh the evidence or to determine the credibility of the witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."

It is also alleged by appellants, that the law requires corroboration of an accomplice and that the testimony of an accomplice alone is not sufficient to establish the guilt of the accused. Of course, Sussman was not and could not have been an accomplice since he could not have been convicted of any of the crimes upon which appellants were indicted, as he lacked the necessary *mens rea,* being a government informant. *Stevenson v. United States,* 211 F. 2d 702 (C. A. 9, 1954); *Risinger v. United States,* 236 F. 2d 96, 99 (C. A. 5, 1956). For this reason, even the rule appellants espouse would not apply.

Appellants quote extensively and apparently rely heavily upon *Sykes v. United States,* 204 Fed. 909 (Br. pp. 28-30), on the point of corroboration of an accomplice being

necessary. This Court expressly dealt with that decision earlier in *Hass v. United States,* 31 F. 2d 13 (C. A. 9, 1929). This Court then said:

> "That a conviction may rest upon the uncorroborated evidence alone of an accomplice is now well settled. *Caminetti v. United States,* 242 U. S. 470 . . . The appellant cites Sykes v. United States . . . The decision in that case was rendered prior to the ruling in the Caminetti Case . . ."

See also:

Doherty v. United States, 230 F. 2d 605 (C. A. 9, 1956);

Pina v. United States, 165 F. 2d 890 (C. A. 9, 1948).

In any event, Sussman was as corroborated an accomplice as one could imagine. His every step was observed by numerous agents and even the majority of his conversations were overheard. The agents testified to the recognition of Marchese's voice, and the incriminatory nature of his statements to Sussman should supply all the corroboration needed, no matter how severe the standard.

III.
Conclusion.

There being no error in the judgments below, they should be affirmed.

Respectfully submitted,

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